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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 774.

ALBERT HERMAN LANDEROS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Should the Supreme Court of the United States grant *certiorari* when a State court has decided a question in accordance with the applicable decisions of this Court?

2. Is a petitioner entitled to *certiorari* solely upon the allegation of a denial of due process under the Federal Constitution when the facts disclose no essential unfairness affecting the trial at which he was convicted?

Statement of the Case.

Petitioner was convicted of the rape of Lois Ann Stiles after a 4 day trial (R191a-35). Threafter, he appealed to the Superior Court of New Jersey, Appellate Division (R2a), but the Supreme Court of New Jersey certified the appeal directly to itself in view of the relationship of the case to another conviction of rape involving the petitioner then before that Court (see Petitioner's Appendix A, p. 21). In his briefs petitioner contended that the trial court erred in admitting evidence of his silence when identified and accused of the crime by Miss Stiles at Rahway, N. J., after his arrest for an attack upon a girl in that city. that the trial court erred in not cautioning the jury as to the effect of such testimony and that the verdict did not establish his guilt beyond a reasonable doubt. On oral argument before the Supreme Court of New Jersey petitioner's counsel charged that the petitioner was the victim of a police "plot" to pin unsolved crimes upon him—a charge he also made in his brief (see Petitioner's Brief, Supreme Court of New Jersey, p. 2).

Although the State began its oral argument, it was not able to conclude the same before the Court rose for the day. During the week intervening between that time and the next sitting of the Court, at which the State was to finish its argument, the Supreme Court of New Jersey inquired whether both sides would consent to having the State obtain and produce public records of the Police Department and Magistrate's Court of Plainfield, N. J., concerning charges made against petitioner some 5 months prior to the date of the crime in the instant case; the public records

of the Police Department of Cranford, N. J., concerning a rape case in that municipality on November 1, 1952, with which petitioner was charged after his arrest on March 9, 1953, and the subsequent identification by the victim; the public records of the Police Department of Rahway, New Jersey, of the facts and investigation of an attack unquestionably made by petitioner on a girl in that City on March 8, 1953; the public records of the Police Department of Westfield, N. J., made in the course of the investigation of the instant case; and the Pre-sentence Investigation and Psychiatric Report on the petitioner made by the Probation Department of Union County, N. J. Both sides consented and the prosecution obtained said records and presented them, together with supplemental statements of the victims in the instant case and the Cranford case made to the staff of the County Prosecutor after they identified petitioner, to the Court. Those records are all before this Court in the appendices to the State's and Petitioner's Supplemental Memorandums, Supreme Court of New Jersey.

The same allegation made here, that he was denied his constitutional right of due process under the Federal Constitution, was made to the State Supreme Court (Petitioner's Appendix E, p. 39; Petitioner's Appendix F, p. 41, 42) by the petitioner. Several weeks after the conclusion of argument and the submission of both Supplemental Memorandums and Appendices, the State Court affirmed petitioner's conviction and rendered a written opinion (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 21 et seq.).

The State Court's opinion left no doubt that it affirmed petitioner's conviction after "careful consideration of all

of the evidence and every aspect of the defendant's contention" (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 27). It appraised the police records furnished by the State, which petitioner alleged showed a denial of due process, in the following language (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28):

> "Counsel for the defense and the prosecutor of the pleas, evincing firm faith in their respective beliefs, in a rather unusual procedure consented to our going outside of the record in an effort to find further light by examining documentary material which was subsequently offered as having some bearing upon certain disputed questions of fact relating to the issues presented to the jury. This material, although helpful, had no persuasive significance in our ultimate determination".

Subsequently, a petition for rehearing in which petitioner again raised the claim of a denial of a constitutional right was denied by the State Court (Petitioner's Appendix C, p. 33).

The facts as they were presented to the trial court and jury are succinctly summarized in the opinion of the Supreme Court of New Jersey (Petitioner's Appendix A, p. 21 et seq.) and will not be repeated here in the interest of brevity. It is significant to note, however, that the petitioner neglects to direct the attention of this Court to the fact that the testimony of the complaining witness in the trial court had cogent corroboration from the testimony concerning the silence of the petitioner when he was spontaneously accused of the crime at Rahway by the complain-

ing witness (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 23 and p. 29). At the trial Detective Duelks testified that Miss Stiles accused the petitioner of being the one who attacked her when the petitioner was approximately five feet from her and the petitioner did not deny it but said nothing (R 54a-1 to 10; R 169a-20 to R 170a-21).

Significantly, too, petitioner is completely silent as to the effect of the testimony of the Rahway police officers as to his attire when he was apprehended and a prisoner at Rahway on March 9, 1953 on the jury's estimate of the credibility of the petitioner. He denied under oath that he was wearing a jacket (Exhibit S-2, R6a, 7a, 168a) when he was arrested in Rahway for an attack upon another young woman (R125a-9 et seq.). Lt. Kinch of the Rahway police testified, however, that the petitioner was wearing the jacket over the suit coat (R164a-19 to 30) and Detective Duelks testified that the petitioner was wearing the jacket over the suit coat rolled up beneath it (R165a-12).

The respondent deems it necessary to correct certain inaccuracies and omissions in the petitioner's statement of the case.

Miss Stiles had more than the momentary glimpse of her assailant that petitioner suggests. She left no doubt in the minds of the trial court and jury that she clearly saw the face of the petitioner (R10a-14), that she noticed his mustache (R9a-31) and observed the double banded wedding ring of the petitioner while he "had his hand on his private" (R9a-27), right "in front of her face" (R10a-19) in the course of the revolting ordeal to which he subjected the young lady (R9a-37).

Although petitioner states that the reason for Miss Stiles being taken to the Army depot at Belle Mead was never explained, the record discloses that she clearly stated that she was taken to that place by the police officers to "look at a suspect" (R26a-20 to 25).

It is patent that the petitioner inaccurately describes the facts surrounding his arrest for the Rahway attack upon Mary Ferranti. He says the attack took place "in a bar" upon a lady whom he slanderously described to the psychiatric examiner as a "hussler" (Petitioner's Supplemental Appendix, 33a). This transparent effort to mislead is even carried into this Court in Petitioner's Statement of the Case (Petition for Writ, p. 6). The conspicuous facts are that the attack on Miss Ferranti took place on a dark street in the City of Rahway "at the rear of the Rahway theatre" (State's Supplemental Appendix, 12a). There can be no question of petitioner's involvement in the Rahway attack in view of the record of the pursuit and apprehension of the petitioner and his positive identification by the attacked girl (State's Supplemental Appendix, 10a to 19a). While the attack on Miss Ferranti in all probability was an attempt at rape, if she had been unable to scream (State's Supplemental Appendix, 14a), the statements taken by the Rahway police from witnesses (State's Supplemental Appendix, 14a, 16a) and the report of the Rahway detectives (State's Supplemental Appendix, 18a) made the problem of proof of intent so clear that the ultimate complaint was only for assault and battery (Petitioner's Supplemental Appendix, 28a).

The Rahway Police Department records clearly explain the supposed discrepancy between Miss Stiles' description

of the petitioner as "stocky built" and the petitioner's normal appearance. The bulk of even a 5′ 10″ person is substantially altered when he is as cunningly attired as the petitioner was when arrested in Rahway:

> "At the time of Landeros' apprehension, he was wearing a light grey tweedish sort of suit. Over this suit he wore a very dark blue or black U. S. Navy foul weather jacket with U. S. Navy and Wango Landeros printed on the back" (State's Supplemental Appendix, 18a).

It is impossible to reconcile petitioner's charitable description of himself as a hard-working family man with the facts of the uncontradicted attack upon Miss Ferranti in Rahway, when petitioner was apprehended only after a police pursuit over railroad embankments, fences and yards while petitioner was wearing the Navy jacket over his suit coat to alter his appearance and his condition otherwise described in the police reports (State's Supplemental Appendix, 10a) as follows:

> "When we got him in the light we found blood on his clothing and his fly was open. Miss Ferranti identified him as the man who had attacked her".

We vigorously disagree with petitioner's statement that the original description of the assailant given to the police by Miss Stiles varies from the descriptions she gave the jury. The description given to the police by her immediately after the attack (Petition for Writ, p. 11) is substantially identical with her testimony at the trial (R8a-18 to R11a-5).

Inexplicably, in the light of his present complaint, when the prosecution attempted to show that the statement de-

scribing her attacker given to the police by Miss Stiles on the morning following the rape coincided with her description of the defendant on the witness stand, the petitioner objected on the ground that such testimony constituted hearsay (R49a-35 to R50a-17) in the following manner:

> "Q. On that date did you have occasion to pursue your duties in connection with the case of one Lois Ann Stiles? A. I did, sir.
>
> Q. Did you interview Lois Ann Stiles on the 31st of January, 1953, in connection with the assault and rape on the prior night? A. Yes, sir.
>
> Q. At that time did you obtain from Lois Ann Stiles a description of the person who was alleged to have assaulted and raped her on the previous night?
>
> Mr. Burrell: If your Honor please, I object to that on the ground this is hearsay.
>
> The Court: Well, the answer is yes or no. It Could only be answered yes or no.
>
> A. Yes, sir.
>
> Q. What description was given to you by Lois Ann Stiles of the man who attacked her on the prior night?
>
> Mr. Burrell: I object to that.
>
> The Court: Objection sustained, because it would be hearsay."

The statement that any differences between the original description given by Miss Stiles and the actual physical appearance of the petitioner were never disclosed to the jury is ludicrous when we consider the manner in which she described her assailant while she was a witness (R8a-18 to R11a-5) and the fact that the petitioner was seated in full view of the jury during the entire four day trial.

The contention in this Court—as in the State Court—that the prosecution suppressed evidence is untenable when we observe how the petitioner repeatedly blocked the efforts of the prosecution at the trial to disclose all of the circumstances surrounding the lack of an open identification to police officers at Belle Mead.

When the State sought to have Miss Stiles explain her testimony as to the person to whom she had identified the defendant on the way home from Belle Mead (R45a-16 to R47a-12), the following transpired:

> "Q. Miss Stiles, when you were being cross examined it is my recollection that when you corrected what you had originally said and said that you did not say to the police officers on the way back from Belle Mead, that you were sure that this was the man who attacked you on January 30, you said that you did say you were sure, to someone else, is that correct? A. That's right.
>
> Q. To whom did you say, either at or on the way back from Belle Mead that you were sure that this was the man who attacked you?
>
> Mr. Burrell: I object to that question.
>
> The Court: Do you contend she said that?
>
> Mr. Weidenburner: That is what the witness indicated on cross examination, in response to counsel's question that she did say she was sure to someone other than the police officer.
>
> The Court: The stenographer will read the record if there is any dispute. It is not for her to say. It is for the record to say.
>
> (At this point the previous testimony of the witness was repeated as follows.)
>
> Q. At Belle Meade or on your way from Belle Mead to Westfield did you say to either the Lieuten-

ant or the Chief, 'I am sure that this is the man'? A. No, I wish to correct that to say it was somebody else. That is the part I wanted repeated because I made a mistake. I mentioned that to somebody else but not to these officers.)

Mr. Burrell: If your Honor please, at this time I move to strike out the portion in which the witness said it was somebody else, as not responsive to the inquiry. In fact, it is not responsive to any question, it is a voluntary correction by the witness of a previous answer to my question, bringing in parties other than the police officers whose activities were then being questioned. I asked no question as to who did she say it to or did she say it to anyone else. I ask what she said to the Lieutenant or the Captain.

The Court: What she told anybody at the time is not evidence, anyway, and the jury is so instructed.

Mr. Burrrell: Will your Honor rule on my motion to strike . as not responsive to any question of mine?

The Court: It is not evidence, anyway, no matter what she said to anybody at that time, it is not evidence, therefore, it is stricken out. Is that satisfactory?

Mr. Burrell: Yes, sir.

Q. Although you did not tell the police officers either while at Belle Mead or on the way returning from Belle Mead, that you were sure that this defendant was the man who attacked you on January 30, 1953, did you tell anyone else?

Mr. Burrell: If your Honor please, I object to that.

The Court: I have already said anything she told to anyone else on that trip home is not evidence and cannot be shown. It is hearsay.

Mr. Weidenburner: It is the State's position that counsel on cross examination has made much ado about the fact that this witness must have told the police or the security officers, and the State is entitled to explain that.

Mr. Burrell: If your Honor please, I move that the jury be excluded at this time. The prosecutor is now trying to show by indirection what it cannot do by direction.

The Court: Objection sustained and the jury is instructed not to pay any attention to the question or inference therefrom".

Again, when the prosecution, in a further attempt to present all of the information—evidential or not—to the trial jury, sought to have the complaining witness explain why she did not tell the police officers at Belle Mead that the defendant was the man who had attacked her, the effort was blocked by the objection of the defendant (R47a-30 to R48a-5) in the following manner:

"Q. Would you tell the Court and this jury why you did not tell the police that he was the man who attacked you on January 30, 1953?

Mr. Burrell: If your Honor please, I object to that, the fact stands for itself, she did not tell the police, she made no accusation in the presence of the defendant and her motives or reasons for not doing so were not the cause of redirect examination. Redirect, your Honor well knows, is to appropriate matters that were brought up newly on cross examination.

The Court: Why she didn't do it or did do it is a conclusion. That is not proper evidence. The question is over-ruled."

While petitioner seeks to exploit a report made by Lt. Hann of the Westfield police some 21 days after the trip to Belle Mead (Petitioner's Supplemental Appendix, 5a), he neglects to point out the conflict between that report and one made by Lt. Rosendale on February 5, 1953, much more contemporaneously with the Belle Mead trip (Petitioner's Supplemental Appendix, 21a), which coincides completely with the testimony of Miss Stiles. Additionally, when the State sought to obtain the very information which the petitioner now charges was suppressed, the defendant blocked the effort, stating that he objected unless it was shown that what happened was in the presence of the petitioner (R50a-27 to R51a-15).

The prosecution elicited before the Court and trial jury the names of all persons who went on the Belle Mead trip (R50a-21 et seq.) but the defendant did not choose to call any of those persons as witnesses and indicated that he had "no cross examination" of Lt. Hann (R51a-39).

Reasons for Denying Writ.

1. The Supreme Court of New Jersey did not decide a federal question of substance in a way that conflicts with applicable decisions of this Court.

2. The record of the trial court and the additional documentary material considered by the Supreme Court of New Jersey do not disclose any essential unfairness affecting the trial at which petitioner was convicted or that he was denied any rights under the Federal Constitution.

ARGUMENT.

POINT I.

The petition should be denied because the State court decided the federal question in accordance with the applicable decisions of this Court.

The writ of certiorari is not one of right but of sound judicial discretion and will be granted by this Court only where there are special and important reasons therefor. In the instant case the petitioner has the burden of establishing that the Supreme Court of New Jersey decided a federal question in a way probably not in accord with the applicable decisions of this Court. Rule 19 (a).

Petitioner contends here that the Supreme Court of New Jersey denied him the constitutional right of due process of law as enunciated in *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. Ed. 214 (1942); *Mooney* v. *Holahan*, 294 U. S. 103, 79 L. Ed. 791 (1935); and *Chessman* v. *Teets*, 350 U. S. 3, 100 L. Ed. (Adv. p. 2) (1955). We observe that none of the cited cases involved a proceeding of the nature here sought to be utilized, nor did this Court grant the privilege requested in this case in any of them. It is, however, deemed appropriate to examine the cited cases to determine with exactitude the standards of due process enunciated therein which defendant claims were denied to him in this case.

In *Pyle* v. *Kansas, supra*, this Court reversed the judgment of the Supreme Court of Kansas denying an application for a writ of habeas corpus and remanded the cause

for a hearing, saying only that the allegations of the petitioner would, if proven, entitle him to relief. The language employed by this Court (317 U. S. at p. 215, 216) is as follows:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal constitution, and, if proven, would entitled petitioner to release from his present custody. Mooney *v.* Holahan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. They are supported by the exhibits referred to above, and no where are they refuted or denied. The record of petitioner's conviction, while regular on its face, manifestly does not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge of the Kansas authorities. No determination of the verity of these allegations appears to have been made. The case is, therefore, remanded for further proceedings."

The case of *Mooney* v. *Holahan, supra,* involved a motion by a petitioner held under a State commitment for leave to file a petition for a writ of habeas corpus. This Court denied the motion on the ground that petitioner had not exhausted the remedies available to him in the State courts. Significantly, as in *Pyle* v. *Kansas, supra,* there was no denial of the petitioner's allegations by the Attorney General of California in the *Mooney* case. Disagreeing with the State officer's contention as to what the re-

quirement of due process under the Federal Constitution consists of, this Court (at 294 U. S. page 112) said:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

The case of *Chessman* v. *Teets, supra,* involved a petition for a writ of certiorari to review the denial by lower Federal courts of an application for a writ of habeas corpus. The petitioner alleged that the California Supreme Court had affirmed his conviction of a crime upon a fraudulent transcript prepared by a corrupt arrangement between the Prosecutor and a substitute reporter after the death of the reporter who acted at the trial. On the record before this Court there was no denial of the petitioner's allegations. The petition was granted and the cause remanded to the U. S. District Court for a hearing on the application for habeas corpus. Citing *Mooney* v. *Holahan, supra,* this Court (at 100 L. Ed. (Adv. p. 3)) said:

> "Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us, the application should not have been summarily dismissed."

All of the foregoing cases are clearly distinguishable from this case, for in the cases of *Mooney* v. *Holahan,*

supra, and *Chessman* v. *Teets*, *supra*, neither state involved made any denial of the petitioner's allegations of fraud or perjury. There is vigorous denial here, which is supported by the facts. In the case of *Pyle* v. *Kansas*, *supra*, the allegations of the petitioner were not refuted or denied, nor was there any determination of the truth of his allegations. In the instant case, in addition to the vigorous denial of the allegations of the petition, all of the allegations were presented to, considered by and rejected by the Supreme Court of New Jersey.

While there is no dispute with the statements made in the cited cases of the principle that a defendant convicted upon perjured testimony, knowingly used by the prosecution, who deliberately suppressed evidence favorable to the defendant, is denied due process of law in violation of the Fourteenth Amendment to the Federal Constitution, the facts in the instant case do not disclose any denial or abridgement of any right of the defendant under the Federal Constitution. Although the petitioner intemperately describes the testimony of the complaining witness as false and irresponsibly accuses the prosecution of knowledge of its falsity and with the deliberate suppression of evidence, nowhere does the record or the documents presented to the Supreme Court of New Jersey justify such extremely distorted characterization. When we consult the record of the trial and observe the efforts of the State to present all of the information—evidential or otherwise—for the consideration of the jury (R45a-16 et seq.; R46a-30 et seq.; R47a-1 to R48a-5; R49a-35 to 50a-17; and R184a-20 to 32), the entirely irresponsible and baseless nature of such charges is made strikingly apparent. We can only assume this factually unjustified attack by the petitioner is a form

of self-deception inspired by that commonly observed facet of human nature which causes the wrongdoer to seek to hold someone other than himself responsible for his present predicament.

The case of *United States* v. *Ragen*, 86 F. Supp. 382 (D. C. N. D. Ill. Ed. 1949) is not apposite. In that case a physician's report which established that the complaining witness had not been raped at all was deliberately suppressed by the prosecution. In the instant case, there is nothing by way of documentary material or otherwise presented to any State court or this court which could establish that the crime with which the petitioner here was charged, was, in fact, not committed.

Even if the testimony of the complaining witness as to the Belle Mead incident is appraised in the manner that the Supreme Court of New Jersey viewed it, as "vacillating and uncertain" and as undoubtedly affecting "her credibility insofar as her identification of the defendant was concerned" (Petitioner's Appendix A, p. 23), her credibility, the extent to which her testimony should be believed, was a question for the jury. The case was submitted to the jury under a charge which consisted in major part of requests submitted by and in the language employed by the petitioner. The jury was, at the request of the petitioner, instructed in an unusually extensive manner on the question of identification and the testimony relating thereto (R187a-23; R187a-27 et seq.; R187a-34 to R188a-10; R188a-28 et seq.).

On appeal from the conviction in the trial court, the Supreme Court of New Jersey found the principal question of identification to be one of credibility, which it held

was one for the jury. (Opinion of Supreme Court of New Jersey, Petitioner's Appendix A, p. 27, 28). That determination by the State Court is entirely in accord with the applicable decisions of this Court.

In the case of *Glasser* v. *United States*, 315 U. S. 60, 86 L. Ed. 680 (1941), this Court (at 315 U. S. page 77) said:

> "The short answer to this is that the credibility of a witness is a question for the jury."

Later, in the same opinion (315 U. S. at page 80) the Court held:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. U. S. *v.* Manton, (C. C. A. 2d) 107 F (2d) 834, 839 and cases cited."

See also, to the same effect, *Goldman* v. *United States*, 245 U. S. 474, 62 L. Ed. 410 (1918); *Stilson* v. *United States*, 250 U. S. 583, 63 L. Ed. 1154 (1919); and *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916 (1945).

The limitation on the power of an appellate tribunal to reject the findings of a jury, recognized by the State Court (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 26, 27), is in accord with the decisions of this Court. In *Lavender* v. *Kurn*, *supra*, (at 327 U. S. 653), this Court held that the appellate court's function is exhausted when the evidentiary basis of the jury's verdict becomes apparent and "it is immaterial that the Court might draw contrary inference or feel another conclusion more reasonable".

POINT II.

The record in the trial court and the additional documentary material considered by the State Court do not disclose any essential unfairness affecting the trial at which the petitioner was convicted or that he was denied any right under the Federal Constitution.

Petitioner's brief is replete with gratuitous conclusions that the prosecution suppressed evidence, and he makes frequent reference to "secret" and "confidential" police files and reports, seeking, abortively, to suggest that the material contained therein was beneficial and favorable to him and was deliberately concealed from him. He fails, however, to support the slanderous charges and innuendo with any factual showing—or, indeed, any showing—from which any legitimate inference of such conduct on the part of the prosecution might be drawn. All of the documentary material which was voluntarily presented to the Supreme Court of New Jersey is now in the record before this Court (See State's Supplemental Appendix, 1a to 20a; Petitioner's Supplemental Appendix, 1a to 34a). A fair analysis of that mass of documentary material justifies the appraisal of it made by the Supreme Court of New Jersey (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28) as follows:

> "This material, although helpful, had no persuasive significance in our ultimate determination".

The complaint, police reports and statements relating to the charge made against the defendant arising out of an attack upon a young woman in Plainfield, New Jersey, on

August 8, 1952, over five months prior to the attack on Miss Stiles involved in the instant case (Petitioner's Supplemental Appendix, 10a to 17a), could not by any stretch of the imagination be regarded as relevant, material or competent in the trial of the case *sub judice*. Nor can we conceive that the Rahway police reports and the statements of witnesses concerning the attack the petitioner made upon Mary Ferranti in that City on March 8, 1953, despite the manner in which the early reports by the patrolmen described the attack (See State's Supplemental Appendix, 10a to 19a; Petitioner's Supplemental Appendix, 28a, 28aa), were in any respect material or relevant upon the question of the guilt or innocence of the petitioner in the instant case.

The great bulk of the material from the files of the Cranford Police Department (Petitioner's Supplemental Appendix, 18a to 24a) was patently inadmissible in the trial of the petitioner in the instant case involving the rape of Miss Stiles in Westfield, because it related to an entirely separate, distinct and unconnected crime charged to petitioner and would have been incompetent as prejudicial to him.

Neither the Bill of Particulars on other indictments pending against the petitioner arising out of the Cranford attack (Petitioner's Supplemental Appendix, 25a, 26a), the blotter entry of the Scotch Plains police department (Petitioner's Supplemental Appendix, 27a) nor the Probation and Psychiatric report (Petitioner's Supplemental Appendix, 29a to 34a) would have been admissible in the trial of the instant case, for none of those documents have any materiality or relevance in the case *sub judice*.

The only additional information provided by the police records before the Supreme Court of New Jersey, which was not before the trial court and jury, is contained in the supplemental statement of the complaining witness and Miss MacLaughlin (State's Supplemental Appendix, 1a to 9a) and the report of Lt. Hann, dated February 25, 1953 (Petitioner's Supplemental Appendix, 5a). Examination of that documentary material discloses nothing that was not presented testimonially before the trial court and jury. Analyzed in the light most favorable to the petitioner, that material shows only that which the complaining witness admitted on several occasions at the trial, that she did not identify the petitioner at Belle Mead (R35a-40; R43a-13). What, then, was suppressed by the prosecution? What, then, was ignored by the State court in its decision?

The obligation of one seeking the aid of this Court on a claim that he was denied his constitutional right of due process is to show essential unfairness as a demonstrable reality, not as a matter of speculation. In *Adams* v. *United States*, 317 U. S. 269, 87 L. Ed. 268, 143 A. L. R. 435 (1942), this Court (317 U. S. at p. 281) said:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

To the same effect, see *Buchalter* v. *New York*, 319 U. S. 427, 431, 87 L. Ed. 1492 (1942) and *Stroble* v. *California*, 343 U. S. 181, 96 L. Ed. 872 (1951).

This Court has not hesitated to deny relief of the nature sought in the instant case where the petitioner has failed

to sustain his burden of showing essential unfairness, even to the extent of denying relief where there was conflicting evidence. In the case of *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166 (1941), the petitioner contended, among other things, that his conviction was in violation of the Fourteenth Amendment in that the testimony of a co-defendant against him was obtained by fraud, was known by the prosecution to be false, and, hence, the trial at which he was convicted was a mere pretense. The petitioner in that case obtained affidavits from the co-defendant who had testified against him and used the same in the course of petitioning for a rehearing of his appeal before the California Supreme Court. As in the instant case, the State Court denied the petition for rehearing, and petitioner appealed to this Court. Under those circumstances, this Court (314 U. S. at page 227) said:

> "* * * and a comparison of the testimony at the trial with the allegations of the affidavits raises serious doubts as to their truthfulness. The appraisal of the conflicting evidence was for the Court below. Even if its refusal to believe Hope's depositions were erroneous, the error would be no more a denial of due process than was its approval, on appeal, of the trial judge's refusal to direct a verdict on the ground of insufficiency of evidence".

There is a striking similarity between the instant case and the situation which this Court considered in the case of *Buchalter* v. *New York*, *supra*. The defendant in that case asserted that the prosecution had denied him due process under the Fourteenth Amendment by suppressing evidence. This Court (at 319 U. S. 431) said:

> "The point as to the alleged suppression of evidence is without merit. Certain documentary evidence was in court. The Judge ruled that the prosecuting officer need not submit it to defense counsel for examination. If there was error in the ruling it was error of the Court. Upon motion for rehearing, the Court of Appeals examined the papers and found that they were not of significance in respect of any issue in the case. No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the State, was shown."

As in the instant case, there was an examination in the Buchalter case by an appellate court of the State of certain documentary material, which was found not to be of any significance. In the instant case, the documentary material was appraised by the Supreme Court of New Jersey as "without persuasive significance" (Opinion, Supreme Court of New Jersey, Petitioner's Appendix A, p. 28). Where the evidence fails to establish any suppression of evidence favorable to the defendant it has been held that he was not denied his guaranties under *Pyle* v. *Kansas, supra*. *White Thunder* v. *Hunter*, 149 F. 2d 578 (C. C. A. 10th 1945), cert. den. 325 U. S. 889, 89 L. Ed. 2002; *Soulia* v. *O'Brien*, (D. C. Mass. 1950) 94 F. Supp. 764, aff'd (C. A. 1st) 188 F. 2d 233, cert. den. 341 U. S. 928, 95 L. Ed. 1359, reh. den. 341 U. S. 957, 95 L. Ed. 1378.

Conclusion.

It is respectfully submitted that the petitioner in the instant case utterly fails to show any essential unfairness—and, certainly, no essential unfairness approaching the

status of a demonstrable reality—as required by the decisions of this Court (*Adams* v. *United States, supra; Buchalter* v. *New York, supra;* and *Stroble* v. *California, supra*), and his petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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